Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–755 OF 2003
HARMINDAR SINGH JC
29 JANUARY 2010

Civil Procedure — Judgments and orders — Setting aside — Judgment or order obtained by fraud

Civil Procedure — Trial — Absence of parties — Absence of defendant at trial — Consequences of

Evidence — Course of trial — Refusal to give evidence — Defendant failing to attend court and give evidence — Consequences of

Equity — Gift — Gift inter vivos — Whether in existence — Circumstances when inter vivos gift of property gives rise to equitable right in property

Equity — Property, equitable interest in — Proprietary estoppel — Circumstances when would operate

Succession — Letters of administration — Revocation of grant — Application for — 'Sufficient cause', how defined — Whether any person having any interest, however slight may apply — Whether mendacious conduct of administrator would establish sufficient cause to revoke letters of administration granted to him — Probate and Administration Act 1959 s 34

Trusts and Trustees — Trustees — Trustee 'de son tort' — Definition of

Words and Phrases — 'sufficient cause' — Probate and Administration Act 1959 s 34

A spinster — one Ariasakthi ('AA') died intestate on 11 March 1994 leaving assets consisting of a house ('the property'), a car and cash in several bank accounts. On AA's death, her estate devolved in law to her mother Maheswary

('MM'). MM applied for letters of administration ('LA') over AA's estate, which were subsequently issued on 21 February 1995. However, MM died intestate on 26 January 1995, solely survived by the plaintiff whom she had adopted by custom in 1966. During her lifetime, MM informed the plaintiff that she intended for him to have ownership of the property upon her death. She had extracted a number of promises from the plaintiff — all of which he had kept. After MM's death, the plaintiff discovered that the defendant had also obtained LA over the estate of AA on 21 February 1995, purportedly as her lawful nephew and that on 12 January 1996 the defendant had further obtained the LA over MM's estate, also purportedly as her lawful nephew. The plaintiff entered a caveat over AA's estate but despite the caveat, the defendant obtained an order dated 21 September 1998 for the property to be transferred and registered in his name. The plaintiff thus applied to the High Court, inter alia, for declaratory orders with regard to his right and/or interest in the property; and for an order under s 34 of the Probate and Administration Act 1959 ('Act') to revoke the grants of probate procured by the defendant over the state of AA and MM. The plaintiff asserted that the property was an inter vivos gift by the MM during her lifetime. The defendant failed to turn up at the trial of the plaintiff's action.

Held, allowing the plaintiff's claim:

(1) There are two consequences when a party does not turn up at trial. First, if only one party appears and the court is ready to hear the matters on the merits, the testimony of all the witnesses present must be heard before a decision is pronounced. Second, unless the evidence is inherently implausible, the court will have to accept such evidence presented as true since no evidence to the contrary has been adduced (see para 6); *Shaharuddin bin Abdul Rahman v Sitisah Ismail Sdn Bhd* [1982] 2 MLJ 79 referred; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 referred.

(2) In the instant case the plaintiff was promised the property as long as he kept the promises. He had in fact kept his promises to MM right up to the time of her death. In the circumstances, it would be unjust and unconscionable to deny the plaintiff's interest in the said property. On the facts of the case, a proprietary estoppel operated in favour of the plaintiff which established his interest in the said property (see para 23); *Tan Chong Kiat v Kwan Ah Soh & Anor* [1998] 3 MLJ 884 referred; *Lim Sui Hong Katherine v Lim Joo Hien Anthony* [1999] 1 SLR 64 (CA) referred; *Thorner v Major* [2009] 3 All ER 94 referred; *Wayling v Jones* (1993) 69 P & CR 170 referred; *Greasley and others v Cooke* [1980] 3 All ER 710 followed.

(3) Section 34 of the Act provides that any probate or LA may be revoked or amended for any sufficient cause. Any person having any interest, however slight, is entitled to make such an application. Whether or not there is 'sufficient cause' entails an objective test. In the instant case, it was quite incredulous for the defendant to be the lawful nephew of a mother and daughter at the same time. The defendant had plainly misrepresented the facts with his dishonest claims. By his mendacious conduct, there was established sufficient cause to revoke the LA granted to him over both the estates (see paras 24 & 27); *Sima Rani Mohanti v Puspa Rani Pal* AIR 1978 Cal 140 followed; *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268 followed; *Re Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68 (FC) referred; *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177 followed.

(4) The distribution order of 21 September 1998 transferring the said property to the defendant could not stand. A litigant ought not to have the benefit of a judgment or order obtained by a serious deception on the court. Further, a judgment or order obtained by fraud may be set aside in a separate action (see para 28); *Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; Official Assignee of the Property of Cheah Lean Guan a Bankrupt* [1935] MLJ 31 referred; *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 referred; *Chee Pok Choy & Ors v Scotch Leasing Bhd* [2001] 4 MLJ 346 referred.

(5) The defendant was at all material times a trustee or *a trustee de son tort* although he was neither appointed nor considered himself as such (see para 29); *Dubai Aluminium Co Ltd v Salaam and others (Livingstone and others, third parties)* [2003] 1 All ER 97 followed.

[Bahasa Malaysia summary

Ariasakthi, seorang yang tidak berkahwin ('AA') meninggal dunia tanpa wasiat pada 11 Mac 1994 meninggalkan harta terdiri daripada rumah ('harta tanah tersebut'), kereta dan wang tunai di dalam beberapa akaun bank. Atas kematian AA, estetnya diturunkan mengikut undang-undang kepada ibunya Maheswary ('MM'). MM memohon surat kuasa mentadbir ('SKM') terhadap estet AA, yang mana kemudiannya dikeluarkan pada 21 Februari 1995. Walau bagaimanapun, MM meninggal dunia tanpa wasiat pada 26 Januari 1995, dia meninggalkan plaintif yang diambil sebagai anak angkat melalui adat pada 1966. Semasa hidupnya, MM memberitahu plaintif bahawa dia berniat agar plaintif memiliki harta tanah tersebut apabila dia meninggal dunia. MM telah mendapatkan janji-janji daripada plaintif — yang mana dia berpegang pada kesemuanya. Selepas kematian MM, plaintif mendapati bahawa defendan juga telah mendapatkan SKM terhadap estet AA pada 21 Februari 1995, sebagai anak saudara lelaki yang sah dan bahawa pada

A 12 Januari 1996 defendan selanjutnya mendapatkan SKM terhadap estet MM, juga sebagai anak saudara lelaki yang sah. Plaintif memasukkan kaveat terhadap estet AA, tetapi walaupun terdapat kaveat, defendan memperolehi perintah 21 September 1998 untuk harta tanah tersebut dipindahkan dan didaftarkan atas namanya. Plaintif oleh itu memohon kepada Mahkamah
B Tinggi, antara lain, untuk perintah-perintah perisytiharan berkaitan haknya dan/atau kepentingannya di dalam harta tanah tersebut; dan untuk perintah di bawah s 34 Probet dan Pentadbiran 1959 ('Akta') untuk membatalkan pemberian probet yang diperolehi oleh defendan terhadap estet AA dan MM. Plaintif menegaskan bahawa harta tanah tersebut adalah hadiah inter vivos
C oleh MM semasa hayatnya. Defendan gagal untuk menghadiri perbicaraan tindakan plaintif.

Diputuskan, membenarkan tuntutan plaintif:

D (1) Terdapat dua akibat apabila pihak tidak menghadiri perbicaraan. Pertama, jika hanya satu pihak hadir dan mahkamah bersedia untuk mendengar perkara atas merit, testimoni kesemua saksi yang hadir mesti didengar sebelum keputusan diumumkan. Kedua, kecuali bukti jelas tidak dapat dipercayai, mahkamah akan menerima bukti yang
E dikemukakan sebagai benar memandangkan tiada bukti yang bertentangan telah dikemukakan (lihat perenggan 6). *Shaharuddin bin Abdul Rahman v Sitisah Ismail Sdn Bhd* [1982] 2 MLJ 79 dirujuk; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 dirujuk.

F (2) Dalam kes ini plaintif dijanjikan dengan harta tanah tersebut asalkan dia berpegang pada janji tersebut. Dia sebenarnya memegang pada janji-janji kepada MM sehingga kematian MM. Dalam keadaan ini, ia adalah tidak adil dan tidak berpatutan untuk menafikan kepentingan
G plaintif di dalam harta tanah tersebut. Atas fakta kes, estopel proprietari berfungsi dengan memihak kepada plaintif yang telah membuktikan kepentinganya di dalam harta tanah tersebut (lihat perenggan 23). *Tan Chong Kiat v Kwan Ah Soh & Anor* [1998] 3 MLJ 884 dirujuk; *Lim Sui Hong Katherine v Lim Joo Hien Anthony* [1999] 1 SLR 64 (MR) dirujuk;
H *Thorner v Major* [2009] 3 All ER 94 dirujuk; *Wayling v Jones* (1993) 69 P & C R 170 dirujuk; *Greasley and others v Cooke* [1980] 3 All ER 710 diikut.

(3) Seksyen 34 Akta memperuntukkan bahawa apa-apa probet atau SKM boleh dibatalkan atau dipinda untuk apa-apa sebab yang memadai.
I Sesiapapun yang mempunyai apa-apa kepentingan, walaupun sedikit, berhak untuk membuat permohonan sebegitu. Sama ada terdapat atau tidak 'sufficient cause' ia memerlukan ujian objektif. Dalam kes ini, ia adalah seolah-olah tidak percaya untuk defendan menjadi anak saudara lelaki yang sah kepada emak dan anak perempuan pada masa yang

sama. Defendan jelas memberikan gambaran yang salah terhadap fakta tersebut dengan tuntutannya yang tidak jujur. Dengan tindakan palsunya, oleh itu terdapat sebab yang memadai yang terbukti untuk membatalkan SKM yang diberikan kepadanya terhadap kedua-dua estet tersebut (lihat perenggan 24 & 27); *Sima Rani Mohanti v Puspa Rani Pal* AIR 1978 Cal 140 diikut; *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268 diikut; *Re Khoo Boo Gong, Deceased Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68 (MP) dirujuk; *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177 diikut.

(4) Pengagihan perintah bertarikh 21 September 1998 yang memindahkan harta tanah tersebut kepada defendan tidak terpakai. Litigan tidak patut mendapat penghakiman atau perintah yang diperolehi melalui penipuan yang serius ke atas mahkamah. Selanjutnya, penghakiman atau perintah yang diperolehi melalui penipuan boleh diketepikan di dalam tindakan yang berlainan (lihat perenggan 28); *Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; Official Assignee of the Property of Cheah Lean Guan a Bankrupt* [1935] MLJ 31 dirujuk; *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 dirujuk; *Chee Pok Choy & Ors v Scotch Leasing Bhd* [2001] 4 MLJ 346 dirujuk.

(5) Defendan pada kesemua masa material pemegang amanah atau pemegang amanah *de son tort* walaupun dia tidak dilantik atau mempertimbangkan dirinya sebagai pemegang amanah (lihat perenggan 29); *Dubai Aluminium Co Ltd v Salaam and others (Livingstone and others, third parties)* [2003] 1 All ER 97 diikut.]

Notes

For a case on trustee 'de son tort', see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2586.

For cases on course of trial generally, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1097–1105.

For cases on gift generally, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2913–2930.

For cases on proprietary estoppel, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3010–3017.

For cases on revocation of grant, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2500–2512.

For cases on setting aside, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4216–4247.

For cases on trial generally, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7812–7910.

Cases referred to

Amaravathy d/o V Nadeson & Anor (both as administratixes of the estate of Ayaduray Sugirtha Lingam, deceased) v Sivapragasam s/o Nagamany (as executor of the estate of K Nagamany Nee Sugirtha Letchumy d/o Ayadurai) [2007] 4 MLJ 319; [2007] 3 CLJ 661, CA (refd)

Anne Lim Keng Seng (trading as Golden Kintex-sole-proprietorship) v Malayan Banking Bhd [2009] 9 MLJ 502; [2009] 6 AMR 432, HC (folld)

Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; Official Assignee of the Property of Cheah Lean Guan a bankrupt [1935] MLJ 31, HC (folld)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (folld)

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [1998] 4 MLJ 268, CA (folld)

Dubai Aluminium Co Ltd v Salaam and others (Livingstone and others, third parties) [2003] 1 All ER 97, HL (folld)

Greasley and others v Cooke [1980] 3 All ER 710; [1980] 1 WLR 1306, CA (folld)

Khoo Boo Gong, Decd, Re, Khoo Teng Seong v Teoh Chooi Ghim & Ors [1981] 2 MLJ 68, FC (folld)

Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177, HC (folld)

Lim Sui Hong Katherine v Lim Joo Hien Anthony [1999] 1 SLR 64, CA (folld)

Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413, HC (folld)

Shaharuddin bin Abdul Rahman v Sitisah Ismail Sdn Bhd [1982] 2 MLJ 79; [1982] CLJ 747 (Rep), HC (folld)

Sima Rani Mohanti v Puspa Rani Pal AIR 1978 Cal 140 (folld)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (folld)

Tan Chong Kiat v Kwan Ah Soh & Anor [1998] 3 MLJ 884, HC (folld)

Thorner v Major and others [2009] 3 All ER 94, HL (folld)

Wasakah Singh v Bachan Singh [1931] 1 MC 125, HC (folld)

Wayling v Jones (1993) 69 P & CR 170, CA (folld)

Legislation referred to

Distribution Act 1958 s 6(1)(ii)

Probate and Administration Act 1959 s 34

Steven Thiru (Aaron Mathews and Horley Isaacs with him) (Horley Isaacs & Associates) for the plaintiff.

Defendant not present.

Harmindar Singh JC:

THE CLAIM

[1] One Madam Maheswary w/o Navaratnarajah ('Madam Maheswary') died on 26 January 1995. She was 79 years old. She had outlived her two unmarried daughters Navasakthi d/o Navaratnarajah ('Navasakthi') who died on 19 June 1993 and Ariasakthi d/o Navaratnarajah ('Ariasakthi') who passed away on 11 March 1994. Apparently, the only person left in the family in Malaysia upon the death of Madam Maheswary was the plaintiff. He claimed that he was her adopted son by custom since the time he was eight years old in 1960. He considered Madam Maheswary as his mother and her two daughters as his sisters. Madam Maheswary, her two daughters and the plaintiff lived on the premises known as No 2, Lorong Halia, Jalan Kelang Lama, Batu 3, Kuala Lumpur ('the property').

[2] Now this property was registered in the name of Ariasakthi who had died intestate. Since she was unmarried, her estate devolved in law to her mother Madam Maheswary. The plaintiff claimed that it was the wish and intent of Madam Maheswary that the said property should belong to him upon her death.

[3] However, without notice to the plaintiff, the defendant purported to apply for and indeed obtained letters of administration over the estate of Madam Maheswary and also replaced Madam Maheswary upon her death as the administrator of the estate of the daughter Ariasakthi. He also obtained a court order dated 21 September 1998 for the said property to be transferred and registered in his name. All these were obtained on the basis that he was their lawful nephew. Now this was a rather remarkable claim as it is hard to imagine that one could be the nephew of both the mother and daughter at the same time.

[4] The plaintiff then filed this claim against the defendant. There are basically two parts to his claim. He is firstly, seeking declaratory orders with regard to his right/interest in the said property. The plaintiff has occupied the property since 1966 as his home and continues to occupy it. Secondly, the plaintiff is seeking an order under s 34 of the Probate and Administration Act 1959 ('the Act') to revoke the grants of probate procured by the defendant over the estates of the late Ariasakthi d/o Navaratnarajah and the late mother, Madam Maheswari w/o Navaratnarajah. Under this part of the claim, the plaintiff also seeks orders to preserve and restore assets of the estates of the

mother and daughter.

THE EVIDENCE

[5] In his defence, the defendant had denied the plaintiffs claim that he was the adopted son of the late Madam Maheswary. He also asserted in his defence that he will prove at the trial that he was the lawful nephew of the late Madam Maheswary. However, he did not turn up at the trial. His solicitors had discharged themselves through a court order dated 3 November 2009 on the grounds that they had failed to receive any instructions from him.

[6] So what is the position that obtains when the defendant does not turn up at the trial? There are two aspects to this. The first consequence is, as I have said elsewhere (*Anne Lim Keng Seng (trading as Golden Kintex-sole-proprietorship) v Malayan Banking Bhd* [2009] 9 MLJ 502; [2009] 6 AMR 432), that if one party appears and the court is ready to hear the matter on its merits, then the testimony of all the witnesses present must be heard before a decision is pronounced (see also *Shaharuddin bin Abdul Rahman v Sitisah Ismail Sdn Bhd* [1982] 2 MLJ 79; [1982] CLJ 747 (Rep)). The second aspect is that unless the evidence is inherently implausible, the court will have to accept such evidence presented as true since no evidence to the contrary has been adduced (*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, *Wasakah Singh v Bachan Singh* [1931] 1 MC 125).

[7] In the instant case, in the absence of the defendant, the evidence at the trial was provided only by the plaintiff and his witness Dr Parameswary a/p Vythialingam (PW2). The evidence revealed the following. In 1966, the plaintiff was adopted as a son by Madam Maheswary when he was eight years old. He then lived with his new mother and two new sisters in the said property which was acquired jointly by the two sisters in 1961. The property was subsequently transferred in the sole name of the sister Ariasakthi and in whose name it remains until today. The plaintiff is currently occupying the said property with his wife and children.

[8] When the two sisters died, it was the plaintiff who had performed the Hindu funeral rights as their brother. He was also identified as their brother in the obituaries in the newspapers. As was noted earlier, Ariasakthi, who was the registered proprietor of the said property died intestate. The Letters of Administration was granted to her mother. By virtue of being the adopted son, the plaintiff claimed that he became the closest living relative and next of kin of the mother, Madam Maheswary.

[9] With regard to the said property, the mother informed the plaintiff that she intended for him to have ownership of the property upon her death. In this respect, she had extracted a number of promises from him which she expected him to comply during her lifetime. These promises were as follows:

(a) that he would reside in the said property with her during the whole of her lifetime;

(b) that he would not marry and live apart from her during the whole of her lifetime;

(c) that he would look after her and provide for her medical needs and care during her lifetime;

(d) that he would always maintain the said property and upkeep it in a fit and habitable condition; and

(e) that at all times he would reside in the said property after her death in the memory of her and her late husband and his two late sisters.

[10] The plaintiff abided by the wishes of the mother and kept all the promises. In this regard, and particularly as the mother's health deteriorated in late 1994, the plaintiff took care of her and attended to her medical needs. The plaintiff stayed with the mother in the said property until she died on 26 January 1995. Again, this time as the son, the plaintiff performed the Hindu funeral rites for the mother. The obituary in the newspaper acknowledged him as the son of the mother.

[11] As the mother had died intestate, the plaintiff had intended to obtain letters of administration in respect of the assets of her estate. He then discovered that the defendant had obtained letters of administration over the estate of Ariasakthi as 'the lawful nephew of the deceased' on 21 February 1995. The list of assets for this estate was declared as follows:

(a) the said property valued at RM130,000;

(b) an Alfa Romeo car registration No WBD 9196 valued at RM30,000;

(c) Oriental Bank Bhd Account No 142–11585–09 with the amount RM17,541.22;

(d) cash amount from the estate of Navasakthi at RM17,303.12; and

(e) Account in Commonwealth Bank of Australia with the amount A$69,306.24.

[12] Now what is extremely odd is that on the same day, that is, 21 February 1995, the mother had also obtained the grant of letters of administration over the same estate of her late daughter Ariasakthi as she was

entitled to do being the lawful mother. The plaintiff then instructed his then solicitors to lodge a caveat over the sister's estate. Despite the caveat, the defendant managed to obtain the court order dated 21 September 1998 which I had alluded to earlier and which was in the following terms:

> DENGAN INI ADALAH DIPERINTAHKAN bahawa Harta Pusaka Ariasakthi a/p Navatnarajah dibahagikan menurut Seksyen 6(1) (ii) Distribution Ordinance, 1958, pada anak saudarnya Satgunasingam a/I Balasingam DAN SELANJUTNYA Bahagian dalam rumah beralamat No. 2 Lorong Halia, Kuala Lumpur diatas tanah E.M.R. 5187, Lot No. 198 (Section 98) Bandar Kuala Lumpur dan didaftar bawah nama Ariasakthi a/p Navatnarajah, mendiang, dipindah dan didaftar pada anak saudaranya Satgunasingam a/I Balasingam DAN ADALAH JUGA Kos Permohonan ini dikeluarkan dari Harta Pusaka mendiang Ariasakthi a/p Navatnarajah.

[13] The defendant then commenced proceedings in the Sessions Court at Kuala Lumpur on 7 October 2002 against the plaintiff and he sought, inter alia, for vacant possession of the said property and to evict the plaintiff from the same. That action was initially stayed pending the disposal of the instant action but was eventually struck out when the defendant's solicitors discharged themselves and the defendant failed to attend court after being directed to do so.

[14] The plaintiff also told the court that after the mother's death, the defendant had entered the said property and took away the mother's private papers, bank documents, wearing apparel including her collection of sarees, family photographs and letters, monies belonging to the estate, jewellery, keys to a safe deposit box in Bumiputra Commerce Bank Bhd, the title to the Alfa Romeo car and the title deeds to the said property.

[15] The plaintiff then filed this instant action and since then, he discovered the following facts:

(a) A search at the High Court (Probate Division) revealed that only the mother has made an application for the letters of administration over the estate of the daughter Ariasakthi. Thus, there is no record of the letters of administration of 21 February 1995 obtained by the defendant over the estate of the sister.

(b) A further search at the High Court registry revealed that the defendant had applied for letters of administration over the estate of the mother on 16 November 1995 as her 'anak saudara lelaki' and he had obtained the letters of administration over her estate on 12 January 1996 on that basis.

(c) The above mentioned search also revealed that the defendant subsequently obtained an order on 6 February 1996 to replace the mother as the administrator of the estate of the sister.

(d) The defendant then applied on 16 June 1998 under s 6(1)(ii) of the Distribution Act 1958 to transfer the said property from the sister to him on the basis that he was the sole beneficiary of the estate of the sister. He obtained the order on 21 September 1998 the terms of which were set out earlier.

[16] Arising from these set of facts and considering the relief the plaintiff is now seeking from the court, the issues for consideration were as follows:

(a) whether there was a gift inter vivos from the late mother to the plaintiff of the said property; and

(b) whether the grants of letters of administration over the estate of Madam Maheswary and the late Ariasakthi ought to be revoked under s 34 of the Probate and Administration Act 1959.

WAS THERE A GIFT INTER VIVOS?

[17] There is no question that the heart of this matter is the claim for ownership of the said property. The plaintiff is asserting that the said property was an inter vivos gift by the mother Madam Maheswary during her lifetime. A gift inter vivos was defined in the case of *Tan Chong Kiat v Kwan Ah Soh & Anor* [1998] 3 MLJ 884 as follows:

> A gift inter vivos may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is still alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession to another person with the full intention that thing shall not return to the donor. It has also been said that a gift is a voluntary transfer of property to another without consideration. A gift appears to be effective when the donor intends to make a gift and the recipient takes the thing given and keeps it, knowing that he has done so.

[18] The Singapore Court of Appeal decision in *Lim Sui Hong Katherine v Lim Joo Hien Anthony* [1999] 1 SLR 64 suggests that an inter vivos gift can exist side by side with the testamentary intentions of the deceased and it is not defeated by probate. In that case, the court upheld an inter vivos gift of property despite the existence of a will once it was proven that the testator had intended that the gift should not form part of his estate. Similarly, our Court of Appeal in *Amaravathy d/o V Nadeson & Anor (both as administratixes of the estate of Ayaduray Sugirtha Lingam, deceased) v Sivapragasam s/o Nagamany (as executor of the estate of K Nagamany Nee Sugirtha Letchumy d/o*

A *Ayadurai)* [2007] 4 MLJ 319; [2007] 3 CLJ 661 also recognised a transfer of property by the deceased prior to his passing as operating outside the letters of administration of his estate.

B **[19]** It is noteworthy that the Singapore Court of Appeal in *Lim Sui Hong Katherine* accepted that an inter vivos gift of property by a donor to a done, in return for the fulfillment of certain promises (consideration), gives rise to an equitable right (in favour of the donee) in the property of the donor.

C **[20]** But a case closer to the facts in the instant case is the recent House of Lords' decision in *Thorner v Major and others* [2009] 3 All ER 94. Here, the plaintiff had worked in a farm without any remuneration for a number of years based on a promise by the owner of the farm that he would inherit the farm on his (the owner's) death. As it were, the owner died intestate and his personal representatives sought to deny the plaintiffs right to the farm. The
D House of Lords unanimously held that the promise made to the plaintiff, coupled with his reliance on it, gave rise to an equitable right in the farm (in the form of a proprietary estoppel) and the personal representatives of the owner were estopped from denying the plaintiff's right to the farm.

E **[21]** A more emphatic example of acquiring such equitable right was the English Court of Appeal case of *Wayling v Jones* (1993) 69 P & CR 170. The plaintiff in that case had cohabited with the deceased for 16 years and was his companion as well as his chauffeur. In return for this, he received living
F expenses and pocket money. However, the deceased had promised that upon his death the plaintiff would inherit certain property (a hotel) and based on the promise, the plaintiff remained with the deceased. However, the deceased failed to bequeath the property to the plaintiff in his will. The court again found that the plaintiff had an equitable right in the property of the deceased
G (the hotel) that was promised to him. The court also observed at p 173 that: 'Once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendants to established that he did not rely on the promises.'

H **[22]** The question that arises is whether it was essential for the claimant to have acted to his or her detriment before any such interest can arise. This exact question was considered in the important case of *Greasley and others v Cooke* [1980] 3 All ER 710; [1980] 1 WLR 1306. The facts and the
I principles that followed are succinctly set out by Lord Denning MR as follows (at p 1311):

> The second point is about the need for some expenditure of money — some detriment — before a person can acquire any interest in a house or any right to stay in it as long as he wishes. It so happens that in many of these cases of proprietary

estoppel there has been expenditure of money. But that is not a necessary element. I see that in *Snell's Principles of Equity* (27th Ed, 1973) at p 565, it is said: 'A must have incurred expenditure or otherwise have prejudiced himself.' But I do not think that that is necessary. It is sufficient if the party, to whom the assurance is given, acts on the faith of it — in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it: see *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 and *Crabb v Arun District Council* [1976] Ch 179 at p 188. Applying those principles here it can be seen that the assurances given by Kenneth and Hedley to Doris Cooke — leading her to believe that she would be allowed to stay in the house as long as she wished — raised an equity in her favour. There was no need for her to prove that she acted on the faith of those assurances. It is to be presumed that she did so. There is no need for her to prove that she acted to her detriment or to her prejudice. Suffice it that she stayed on the house — looking after Kenneth and Clarice — when otherwise she might have left and got a job elsewhere. The equity having thus been raised in her favour, it is for the courts of equity to decide in what way that equity should be satisfied. In this case it should be by allowing her to stay on in the house as long as she wishes.

I would therefore allow the appeal and grant a declaration on the counterclaim that Miss Cooke is entitled to occupy 32, George Street, Riddings, rent-free so long as she wishes to stay there.

[23] Coming back to the facts in the instant case, it was in evidence that the plaintiff was promised the property so long as he kept the promises. The plaintiff had kept his promises and had looked after Madam Maheswary right up to the time of her death. In the circumstances, it would be unjust and unconscionable to deny the plaintiff's interest in the said property. On the facts of the case, I was more than satisfied that a proprietary estoppel operated in favour of the plaintiff which established his interest in the said property.

SHOULD THE GRANTS OF LETTERS OF ADMINISTRATION BE REVOKED?

[24] Section 34 of the Probate and Administration Act 1959 provides that any probate or letters of administration may be revoked or amended for any sufficient cause. But who is entitled to make the application for revocation? In the Indian case of *Sima Rani Mohanti v Puspa Rani Pal* AIR 1978 Cal 140, it was held (at the headnotes):

Any interest, however slight and even the bare possibility of an interest, is sufficient to entitle a person to make an application for revocation. Whether revocation will be granted or not is a different matter, for it would depend on the applicant's proving the will, which has been probated, to be genuine etc.

[25] And what is sufficient cause? The Court of Appeal in *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268 applied the test in the Federal Court case of *Re Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68 and held (at the headnotes):

> Section 34 of the Act empowers the court to interfere if 'sufficient cause' is shown. The phrase 'sufficient cause' is not defined, but the courts have always considered the welfare and interests of the beneficiaries of an estate as the paramount criterion in deciding whether or not there is sufficient cause to interfere. This is strictly an objective test.

[26] On the same question of 'sufficient cause', Abdull Hamid Embong J (as he then was) in *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177 accepted that 'all that is needed is for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act to invoke the court's jurisdiction under s 34 of the Probate and Administration Act 1959 and allow the reliefs sought'.

[27] Now as was adverted to earlier, the defendant had obtained letters of administration over the estates of Madam Maheswary and her daughter Ariasakthi on the basis that he was their lawful nephew. There was evidence given by both the plaintiff and PW2, who was a neighbor and had known the family for a long time, that this was untrue and at best the defendant was only a distant relative. In any case, it is quite incredulous to suggest that he (the defendant) could be the lawful nephew of a mother and daughter at the same time. The defendant has plainly misrepresented the facts with his dishonest claims. By his mendacious conduct, I am more than satisfied that there is established sufficient cause to revoke the letters of administration granted to him over both the estates.

[28] Accordingly as well, the distribution order of 21 September 1998 transferring the said property to the defendant cannot stand. It is trite law that a litigant ought not to have the benefit of a judgment or order obtained by a serious deception on the court. It is also settled that a judgment or order obtained by fraud may be set aside in a separate action (*Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; Official Assignee of the Property of Cheah Lean Guan a bankrupt* [1935] MLJ 31, *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413, *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346).

[29] In the circumstances, as was urged by learned counsel for the plaintiff, I am inclined to hold that the defendant was at all material times a trustee or

a trustee de son tort although he was neither appointed nor considered himself as such. In *Dubai Aluminium Co Ltd v Salaam and others (Livingstone and others, third parties)* [2003] 1 All ER 97, the House of Lords defined a 'trustee de son tort' as (at p 130):

> ... a person who, though not appointed to be a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee on behalf of others. In *Taylor v Davies* [1920] AC 636 at p 651, Viscount Cave described such persons as follows:
>
> > ... though not originally trustees, (they) had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named.
>
> Substituting dog Latin for bastard French, we would do better today to describe such persons as de facto trustees. In their relations with the beneficiaries they are treated in every respect as if they had been duly appointed. They are true trustees and are fully subject to fiduciary obligations.

ORDERS

[30] In the circumstances, the plaintiff is entitled to the relief that he is seeking from the court. Accordingly, I made the following orders:

(a) a declaration that the said property (No 2, Lorong Halia, Jalan Kelang Lama, Batu 3, 58000 Kuala Lumpur — Hakmilik No: GM 2751, Lot 198 Seksyen 0098, Mukim Kuala Lumpur) constitutes a gift inter vivos to the plaintiff and does not comprise of or form any part of the estate of Madam Maheswary w/o Navaratnarajah;

(b) an order under s 34 of the Probate and Administration Act 1959 that all grants of letters of administration to the defendant over the estate of the late Madam Maheswary w/o Navaratnarajah and over the estate of Madam Ariasakthi d/o Navaratnarajah be revoked;

(c) a declaration that the said property had devolved to Madam Maheswary w/o Navaratnarajah upon the death of Madam Ariasakthi d/o Navaratnarajah and therefore did not constitute part of the estate of Madam Maheswary w/o Navaratnarajah;

(d) an order that the court order dated 21 September 1998 in the Kuala Lumpur High Court Petition No S1–31–451 of 1994 be set aside;

(e) an order that the defendant forthwith surrenders the title of the said property to the plaintiff;

A (f) an order that the said property be transferred from the late Madam Maheswary w/o Navaratnarajah to the plaintiff;

(g) an order that for the purposes of the transfer of the said property to the plaintiff, the senior assistant registrar of the High Court be and is hereby authorised to sign a memorandum of transfer in due form transferring the said property to the plaintiff;

(h) an order that upon the presentation of the duly executed memorandum of transfer accompanied by the title to the said property, the proper registering authority be and is hereby required to forthwith register the same in the name of the plaintiff;

(i) a declaration that the defendant is and was at all material times a trustee de son tort;

(j) an order that the defendant do make restitution to the estate as follows:

(i) refund the sum of AUD69,306.24 (as at 16 November 1995) and all other bank monies withdrawn from the bank accounts of the late Madam Maheswary w/o Navaratnarajah, including the sum of RM17,541.22 from Oriental Bank Bhd Account No 142–11585–09 (as at 16 November 1995); and

(ii) restore the title to motor vehicle registration No WBD 9196 to the estate;

(k) an order that the defendant do within two weeks of the order made herein depose and file an affidavit of accounts of all dealings relating to the estate including a statement of income and expenditure from the time of the grant to the date of the order;

(l) an order that the official administrator be appointed as the interim administrator over the estate of the late Madam Maheswary w/o Navaratnarajah pending a fresh application of letters of administration;

(m) parties are liberty to apply for directions; and

(n) costs in the amount of RM10,000 be paid by the defendant to the plaintiff.

Plaintiff's claim allowed with costs.

Reported by Andrew Christopher Simon